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No. 05-1667

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

NATHANIEL GOLDSMITH,

Petitioner,

v.

SWAN REEFER A.S., AND
DEL MONTE FRESH PRODUCE N.A., INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Whether the Third Circuit correctly affirmed the trial court's granting of summary judgment where Del Monte Fresh Produce N.A., Inc. breached no legal duty with respect to Nathaniel Goldsmith's accident?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Del Monte Fresh Produce N.A., Inc. is a non-governmental party to this litigation. The parent corporation of Del Monte Fresh Produce N.A., Inc. is Del Monte Fresh Produce Company. The following publicly held companies hold 10% or more of Del Monte Fresh Produce N.A.'s stock: Del Monte Fresh Produce Company.

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OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Del Monte Fresh Produce N.A., Inc., respectfully prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 6, 2006 which affirmed the grant of Summary Judgment to Del Monte Fresh Produce N.A., Inc. by the District Court be denied, and in support thereof, represents as follows:

OPINIONS BELOW

The Third Circuit Court of Appeals Opinion was marked "Not Precedential" but was published at 2006 U.S. App. LEXIS 8577. The District Court's Opinion was marked "Not for Publication" and was not published.

BASIS FOR JURISDICTION

The Third Circuit filed its Decision on April 6, 2006 affirming the grant of summary judgment in favor of Del Monte because Goldsmith failed to create a triable issue that Del Monte breached a duty of care it owed to him under federal maritime law. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Third Circuit Court of Appeals decision on a Writ of Certiorari.

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Del Monte Fresh Produce N.A., Inc. ("Del Monte"), a terminal operator at Pier Five in Camden, New Jersey, is in the business of distributing fresh fruit through the Camden port. (Pet. App. at 17.)[1] Del Monte's fruit, which is grown in Columbia and Costa Rica, is shipped in pallets and large refrigerated metal containers. The containers, which arrive in Camden stacked on the decks of ocean-going vessels, are removed by shipboard cranes and placed on the chassis of trucks waiting on the wharf. (Pet. App. at 18.)

At all relevant times, and in 2001, Del Monte had a multi-million dollar services contract with Delaware River Stevedores ("DRS"), an expert stevedore who assumed the crucial role of removing the containers and palletized cargo from vessels calling at Pier Five. (Pet. App. at 17-18.) To ensure the freshness of its incoming produce, Del Monte's warehouse supervisor, Keith Jenks, met with DRS' three on-site managers and union foremen every Friday to discuss the stowage of the vessels calling the following week and the order in which the cargo would be discharged. (Pet. App. at 22.) Once Del Monte's warehouse supervisor and DRS' managers and foremen decided on the cargo discharge plan, the actual process of unloading the vessels and the method and manner in which this was done became the sole responsibility of DRS. (Pet. App. at 12, 23.) DRS' Ship Foreman testified that Del Monte in no way supervised or controlled the physical discharge of the vessel and that the sole responsibility for the safe and proper discharge of the vessel rested with DRS. (Pet. App. at 22-23.)

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[1] Petitioner's Appendix.

DRS' operation at Pier Five was extensive. In addition to the dozens of longshoremen who specialized in the unloading of cargo from the vessels, DRS employed union checkers and clerks (for counting and checking produce entering and leaving the warehouse), car loaders (for loading palletized produce from the refrigerated warehouse into delivery trucks), and union coopers (for general facility maintenance and equipment repairs). All told, DRS employed over 100 workers at Del Monte's Pier.

On the vessel discharge side, DRS' chain of command, top to bottom, consisted of its three on-site managers, the union Ship Foreman, four "gang" foremen, and four fifteen-member "gangs" of longshoremen. (Pet. App. at 18.) By February 2001, Nathaniel Goldsmith had worked as a longshoreman for over 30 years. (Goldsmith Cert. Pet. at 5.) He had been employed as a gang member at the Del Monte terminal since it first opened in the late 1980's.

On February 20, 2001, Goldsmith was engaged in container discharge aboard the TUNDRA COMSUMER near the third shipboard crane. (Pet. App. at 18.) Among his duties was the removal of the corner locks (a.k.a. "pineapple locks") which secured the containers to one another and to the ship's deck. (*Id.*) The accident at issue occurred when Goldsmith, while retrieving pineapple locks, stepped between a hoisted container and the edge of the vessel. (Pet. App. at 18-19.) In doing so, he placed himself in a blind spot – behind the container – where the shipboard crane operator (fellow DRS employee, Henry Wolfinger) could not see him. (Pet. App. at 19.) The crane operator insisted he had been holding the hoisted container in the air, waiting for an empty truck chassis to park on the pier below to receive the container. When the chassis arrived a few moments later, and while Goldsmith was still standing in the blind spot retrieving the locks,

the crane operator moved the container in an inshore direction, sweeping the concealed Goldsmith overboard. (Pet. App. at 19.) Goldsmith himself agreed with Wolfinger's description of the accident, although at other times in his testimony, he speculated that vessel listing might have played a role in the accident. Several longshoremen witnesses also attributed the accident partly to an additional factor involving a second crane at the vessel's forward end. (Pet. App. at 3.) The witnesses said the forward crane lowered its container onto another waiting chassis, leading Wolfinger to believe it was his turn to move his container inshore. Actually, the forward crane had not placed the container flush on the chassis, so it picked up the container again, causing the vessel to again list inshore; the inshore listing coincided with Wolfinger's lift of his container, which then also swung inshore and pushed Goldsmith overboard. (Goldsmith Cert. Pet. at 6-7.)[2]

Goldsmith sued Del Monte, Swan Reefer, and other now-released defendants in May 2002. His sole claim against Del Monte was that it should have prevented Goldsmith and his employer, DRS, from using two "gangs" of longshore labor. (Goldsmith Cert. Pet. at 21.) Goldsmith contends that the use of two gangs, which makes possible the simultaneous use of two shipboard cranes, created the vessel listing which caused his accident. (*Id.*) Rejecting plaintiff's theory of liability at the summary judgment stage, the trial court held that, to the extent listing of the vessel may have played a role in the accident, DRS' witnesses unanimously testified it was their responsibility and practice to control listing by staggering and timing their container lifts. (Pet. App. at 49-51.) "It was not the use of two cranes that created the unsafe condition," the

[2] Goldsmith's Petition for Writ of Certiorari.

trial court held, " . . . but rather, how the cranes were operated or synchronized that created a more dangerous condition." (Pet. App. at 50.) The court concluded, "Del Monte played no role in how the cranes were operated. . . . " (Pet. App. at 50-51.)

Based on DRS' complete control of the discharge process, including the timing of container lifts, as well as the lack of notice to Del Monte, the trial court granted summary judgment. (Pet. App. at 52.) The Third Circuit Court of Appeals subsequently affirmed the trial court. (Pet. App. at 14.) Plaintiff now petitions this court for a Writ of Certiorari.

SUMMARY OF REASONS TO DENY THE PETITION

Goldsmith contends that the use of two shipboard cranes is dangerous and that Del Monte had a duty to prevent his stevedore-employer, DRS, from discharging container vessels calling at Del Monte's port terminal in this fashion. In fact, DRS normally did not discharge with two cranes simultaneously; rather, the longshoremen testimony established that DRS, to minimize vessel listing, staggered and timed its container lifts. Additionally, DRS proffered no expert testimony contending that Del Monte was negligent or that the appropriate standard of care for terminal operators such as Del Monte was to prohibit use of two shipboard cranes. More basically, the longshoremen testimony established that DRS was exclusively responsible for the discharge of vessel cargo and Goldsmith has conceded that Del Monte was not on notice of DRS' alleged failure to properly time its container lifts. Thus, the Third Circuit and the district court correctly held that, under the facts of this case, Del Monte did not

breach the maritime standard of negligence and/or any duty of care owed to Goldsmith. The Court should therefore deny Goldsmith's petition because this case does not qualify for or otherwise merit review in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Del Monte Had No Legal Duty Under The Facts Presented Because 1) DRS Exercised Complete Control Over The Unloading Of Shipboard Containers, 2) DRS Normally Staggered And Timed Its Container Lifts To Minimize Vessel Listing, And 3) Del Monte Had No Notice Of Any Alleged Failures By DRS To Properly Time Its Container Lifts. Additionally, Goldsmith Has Proffered No Expert Testimony That Del Monte Breached Any Standard Of Care For Terminal Operators.

Goldsmith's sole argument against Del Monte is that it should have prevented Goldsmith and his employer, DRS, from discharging vessels using two gangs of longshore labor. (Pet. App. at 11.) Goldsmith contends that the use of two gangs, which makes possible the simultaneous use of two shipboard cranes, created the vessel listing which caused plaintiff's accident and injury. (*Id.*) While the unanimous testimony of the three direct eyewitnesses to the accident establishes that the vessel listing was likely not a factor in this accident, Goldsmith's "listing theory," even if believed, could never prevail in this case because the unchallenged evidentiary record reveals that Goldsmith's employer, DRS, was exclusively responsible for vessel discharge, was aware of vessel listing and readily dealt with it by timing the cranes' container lifts. Moreover, Goldsmith has failed to proffer any expert

testimony establishing that Del Monte was negligent or that the appropriate standard of care for terminal operators such as Del Monte was to prohibit use of two shipboard cranes.

Goldsmith's contention is that Del Monte breached a hypothetical duty to intervene and prevent DRS from engaging in the entirely normal marine practice of using two shipboard cranes to discharge cargo. (Pet. App. at 11.) Preliminarily, it must be emphasized that container vessels, which are regularly built with multiple cranes, always list during container discharge, regardless of how many cranes are in operation; the simple fact is that when a vessel sitting on water swings a twenty ton container out over its deck and then in shore, vessel listing is inevitable and expected. (Pet. App. at 20.) All the container vessels that call at Del Monte's terminal, where DRS has been unloading vessels for more than seven years, possess multiple cranes. Vessel listing during container discharge is an expected and typical event that all of the longshoremen who testified in this matter admitted they regularly encountered. (Pet. App. at 20.) Thus, Goldsmith's contention that DRS should have used land-based cranes instead of shipboard cranes is without support in the record.

Moreover, given the predictable and expected nature of vessel listing and the typical use of two cranes, it was incumbent on Goldsmith to produce expert testimony on the issue of how Del Monte breached some standard of care by allowing DRS to utilize two shipboard cranes. *J & J Snack Food Corp. v. Earthgrains Co.*, 220 F.Supp.2d 358, 368 (D.N.J. 2002); *Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2001). In this case, however, plaintiff proffered no expert testimony against Del Monte and has conceded that the only expert he did identify (Captain Hagedorn) provided

his opinion against Swan Reefer, the co-appellee, only. (Pet. App. at 25.) Accordingly, absent expert testimony a jury would be called upon to speculate as to the alleged unreasonable danger presented by the standard container vessel practice of utilizing two shipboard cranes.

An equally elemental flaw in Goldsmith's theory of a legal duty against Del Monte is the unanimous testimony of his own co-employees that their employer, the stevedore, DRS, controlled the method and manner in which the vessels calling at Del Monte's terminal were discharged and, moreover, that the common occurrence of vessel listing during multi-crane discharge was readily handled by the use of hand signals and timing of container lifts. (Pet. App. at 22, 23.) Significantly, William Collins, DRS' Ship Foreman at the terminal, stated unequivocally that he was the individual ultimately responsible to regulate vessel listing during discharge and that Del Monte had no responsibility to control vessel listing. (Pet. App. at 23.)

As with Ship Foreman Collins, the consistent testimony of the many experienced longshoremen who were deposed in this case was that vessel listing related to the use of two cranes was best controlled by the timing of container lifts, often through hand signals. (*Id.*) The timing of lifts corrected any potential danger and the responsibility for correcting this alleged danger rested completely with DRS, Goldsmith's employer. (*Id.*) The record is simply devoid of any evidence either that Del Monte controlled the method and manner in which the vessels were discharged or that Del Monte knew or had any responsibility to intervene in situations where hand signals were not being used or lifts were not being timed by DRS.

DRS' Ship Foreman William Collins very clearly testified that once he arrived at work Monday mornings and received the discharge plan for the order of unloading the on-deck containers and the cargo in the hatches, the responsibility for discharging the vessel was DRS', not Del Monte's:

> Q. In terms of the discharge plan, you mentioned that you had received the discharge plan when you arrived at work typically on Monday mornings. You would get that from the DRS management people. From that point forward, would you have any reason to be talking to any of the Del Monte employees you just identified in terms of how the ship was being discharged, the method of being discharged?
>
> A. No, I wouldn't.

Goldsmith's assertion that Del Monte somehow maintained control of the DRS' stevedoring operations is completely contradicted by the actual evidence of record. (Pet. App. at 46.) Plaintiff similarly contends inexplicably throughout his Petition that Del Monte somehow required that DRS *simultaneously* use two cranes. (Goldsmith Cert. Pet. at 21.) Yet DRS' own witnesses testified that it was specifically DRS' policy *not* to use two cranes at once. Ship Foreman Collins testified: "We try to avoid coming out together. We bring one out and then bring the other out." When asked whether two cranes discharged containers at the same time on some occasions, Collins stated: "Rarely. We try not to do it because of the roll of the ship." Longshoreman Robert Saravello agreed that DRS' policy was to unload one container at a time:

> Q. Is it DRS' policy to have one crane discharge its container before the other crane begins to discharge its container?

A. Yes, that's the policy.

Q. Would you also agree, Mr. Saravello, that it's the responsibility of the longshoreman working the vessel to make sure that that policy is followed?

A. Yes, I'll agree with that, yes.

Goldsmith repeatedly contends throughout his Petition that multiple longshoremen testified to the dangers of two-crane discharge. (Pet. App. at 46.) In fact, the longshoremen actually testified that use of two cranes *could be* dangerous when lifts were not timed and hand signals were not used – two simple safety mechanisms which, significantly, were completely within the control of Goldsmith's employer, DRS, and his many longshoremen co-employees.

Not only does the record establish that the responsibility for controlling listing rested with DRS; it also establishes that Del Monte was never placed on notice of Goldsmith's apparent belief that DRS was not properly controlling vessel listing. The trial court in fact notes in its decision that Goldsmith omitted from its submissions the transcript page where Del Monte's terminal manager, Ernie Casper, specifically addressed the issue of Del Monte's notice. (Pet. App. 21 n.5.) Significantly, in that testimony Casper directly denied that he or Del Monte had any knowledge that DRS was failing to control vessel listing during container discharge. In fact, Goldsmith makes a fatal concession in his Petition that the reason Del Monte was never placed on notice of this alleged danger was because doing so would have had the effect of "chasing the work elsewhere." (Goldsmith Cert. Pet. at 8-9). If Del Monte was never told about this danger and plaintiff can cite no evidence that Del Monte was aware DRS was

failing to properly control vessel listing, then no duty Del Monte may have had can be triggered on these facts.

Goldsmith has produced no evidence of Del Monte's responsibility for this accident. Goldsmith does cite to the recent case of *Mullen v. Alicante Carrier Shipping Corp.*, which is easily distinguishable. (Goldsmith Cert. Pet. at 21.) In *Mullen*, Del Monte purchased and provided allegedly defective slings which, the plaintiff contended, caused his injury. *Mullen v. Alicante Carrier Shipping Corp.*, U.S. Dist. LEXIS 20055 at *1 (E.D. Pa. 2004). In *Mullen*, Del Monte acknowledged it was previously aware that knots developed in these slings, and the trial court determined that it was a jury question as to whether reasonable care in eliminating the knots had been exercised. *Id.* at *10-11. In the instant case, however, Del Monte had no control and no notice of the alleged factors that caused Goldsmith's injury. Del Monte did not control Goldsmith's conscious decision to place himself in a blind spot during unloading operations; Del Monte did not control the crane operator's decision to move the container after Goldsmith had placed himself in that blind spot; and Del Monte did not control DRS' unloading operations which (the unanimous testimony revealed) included correcting any vessel listing by use of hand signals and timing of container lifts. In sum, Goldsmith has not presented any evidence establishing Del Monte's control or responsibility for any contributing factor to Goldsmith's accident. Rather than establishing Del Monte's responsibility, the record unequivocally places vessel discharging responsibility on DRS.

At its essence, Goldsmith's legal argument appears to be that general negligence law, applied in the maritime context, renders every issue of liability a jury question. (*See* Goldsmith Cert. Pet. at 20-21.) Goldsmith misconstrues

Third Circuit precedent to support his implied proposition that a general duty of reasonable care can never be the subject of a summary judgment motion. The contrary is in fact true. In any negligence case, regardless of maritime or other context, where an employer acknowledges its control of both the mechanism of the accident (in this case, the crane) and the means to prevent the accident (in this case, the timing of the lifts and the use of hand signals), and moreover where the record is devoid of any evidence that a third party had notice the employer was failing to prevent the accident (in this case, Goldsmith concedes Del Monte was not notified of DRS' alleged failure to control vessel listing), summary judgment is appropriate as a matter of law.

2. The Third Circuit Correctly Held That, Under The Facts Of The Case, Del Monte Did Not Breach The Maritime Standard For Negligence And Did Not Breach Any Duty Of Care It Owed Goldsmith.

The Third Circuit correctly affirmed the decision of the trial court granting summary judgment in favor of Del Monte. The court of appeals stated that federal maritime tort law was appropriate and that Del Monte owed Goldsmith a "duty of exercising reasonable care under the circumstances of each case." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959); (Pet. App. at 11.). Under the circumstances of Goldsmith's injury, however, there is an absence of any evidence showing that Del Monte breached its duty of exercising reasonable care. Where DRS's witnesses unanimously agreed DRS was responsible for vessel discharge and, moreover, DRS routinely controlled vessel listing by timing container lifts, there is simply no evidence that Del Monte breached any duty it owed Goldsmith. The fact that

Del Monte was never alerted to DRS's alleged failure to properly time container lifts merely reinforces its complete lack of responsibility for this accident.

CONCLUSION

Del Monte did not breach any duty owed to Goldsmith because his employer, DRS, admitted its complete responsibility for safe vessel discharge and because Del Monte had no notice of any alleged failure by DRS to properly time container lifts by DRS' own crane operators. The Third Circuit held that while a port operator has a duty of reasonable care, under the circumstances presented there was no evidence that Del Monte failed to exercise that reasonable care. This correct decision by the Third Circuit – affirming the trial court's grant of summary judgment in a matter of routine negligence law – provides no basis for further consideration by this Court.

For the foregoing reasons, Respondent respectfully requests this Court to deny a Writ of Certiorari to review the decision of the Third Circuit.

Respectfully submitted,

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